

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

FILED

MAR 18 2003

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

SAVE THE MANATEE CLUB, et al.

Plaintiffs,

v.

LT. GENERAL JOE N. BALLARD, et al.

Defendants.

Civil No. 1:00CV00076 EGS/JMF

STIPULATED ORDER

WHEREAS, on January 13, 2000, Plaintiffs, eighteen environmental organizations and three individuals, filed suit against the U.S. Army Corps of Engineers ("Corps") and the U.S. Fish and Wildlife Service ("Service") alleging violations of several federal statutes, including the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 et seq., the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §§ 1361 et seq., and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 et seq., with regard to the Florida manatee;

WHEREAS, this Court granted the Motions of the Association of Florida Community Developers, Inc., the National Marine Manufacturers Association, the Marina Operators Association of America, and the Marine Industries Association of Florida, Inc. (collectively "Intervenors") to intervene as defendants in this case;

WHEREAS, by Settlement Agreement, approved by the Court on January 5, 2001, the

parties formally resolved their disputes;

WHEREAS, Paragraph 17.B of the Settlement Agreement provides that a party to the agreement may initiate the dispute resolution process to challenge actions arising out of or relating to the Settlement Agreement by filing a Notice of Controversy;

WHEREAS, by correspondence dated October 24, 2001, the Plaintiffs filed a Formal Notice of Controversy with the Department of Justice challenging certain actions taken by the Service alleging that these actions violated the Settlement Agreement;

WHEREAS, on April 17, 2002, the Plaintiffs filed an Expedited Motion to Enforce the Settlement Agreement, and on July 9, 2002, the Court found that the Service had not fulfilled its requirement under the Agreement to designate refuges and sanctuaries throughout peninsular Florida;

WHEREAS, the Court ordered on August 1, 2002, and November 7, 2002, that federal defendants show cause why they should not be held in contempt for violating the Court's orders of January 5 and January 17, 2001, and August 1, 2002;

WHEREAS, the Plaintiffs and the federal defendants desire to resolve the controversies that are the subject of this Stipulated Order;

WHEREAS, the federal defendants do not concede any wrongdoing, and the plaintiffs and federal defendants agree that the following Stipulated Order is a just, fair, adequate and equitable resolution of the disputes between the parties;

WHEREAS, the plaintiffs and federal defendants agree that settlement of this controversy is in the public interest;

NOW, therefore in consideration of the premises hereinabove stated and the mutual terms

and conditions hereinafter set forth, the plaintiffs and federal defendants agree as follows:

Manatee Protection Areas

1. In accordance with 50 C.F.R. §§ 17.100-17.107, the Service agrees to submit to the Federal Register for publication a proposed rule for the designation of additional manatee protection areas (i.e., refuges and/or sanctuaries as defined in 50 C.F.R. § 17.102) in the Caloosahatchee River (Lee County, Florida), the St. Johns River (Duval, Clay, and St. John's County, Florida), and the Halifax River/Tomoka River (Volusia County, Florida) on or before March 31, 2003. Exhibit A describes the areas that the Service has determined, based on the current best available data, should be proposed as manatee refuges or sanctuaries.
2. The Service agrees to submit to the Federal Register for publication its final decision on the proposed rule described in paragraph 1 on or before July 31, 2003. Plaintiffs and Federal Defendants agree that the Service retains its discretion consistent with the Administrative Procedure Act in reaching its final decision with respect to manatee protection areas identified in paragraph 1.
3. For any areas that are designated as manatee refuges or sanctuaries in accordance with the process described in paragraphs 1 and 2, the Service agrees to the maximum extent practicable to place temporary signs/buoys at each designated site no later than August 31, 2003, that will advise the public to the extent feasible about applicable restrictions. The Service will initiate the process of placing permanent signs no later than September 1, 2003, with placement of all permanent signs to be completed as soon as practicable thereafter. The Service agrees to provide the parties a report on progress in placement of

signs at each refuge or sanctuary every 30 days until permanent signage for each refuge or sanctuary is complete, with the first report due to the parties on September 30, 2003.

4. For those areas designated by the Service as manatee refuges or sanctuaries in the final rule published in the Federal Register on November 8, 2002, the Service agrees to initiate the process of placing permanent signs on or before February 10, 2003, with placement of all permanent signs to be completed as soon as practicable thereafter. The Service agrees to provide the parties a report on progress in placement of permanent signs at each refuge or sanctuary every 30 days until permanent signage for each refuge or sanctuary is complete, with the first report due to the parties on March 10, 2003.

Section 7 Consultation

5. The plaintiffs and federal defendants acknowledge the Service's memorandum dated January 22, 2003, concerning "Consultation Procedures to be Followed for All Watercraft-related Access Activities Occurring within Peninsular Florida." The plaintiffs and federal defendants recognize that a failure by the Service to take any actions specified in the memorandum shall not constitute a violation of this Stipulated Order. The plaintiffs and federal defendants also agree that, until the date of the last report due under paragraph 3 of this Stipulated Order, or until December 31, 2003, whichever occurs first, should the federal defendants revise, change or supercede the substance of the memorandum described in this paragraph, through the Director of the Service or the Assistant Secretary for Fish and Wildlife and Parks of the U.S. Department of the Interior, the Service will, within ten (10) working days, notify plaintiffs and defendant-intervenors through counsel of record of any such change.

6. To the extent that the Service's memorandum of January 22, 2003, described in paragraph 5 constitutes a revision of the interim guidance, this Stipulated Order constitutes notice to all parties to the January 5, 2001, Settlement Agreement of such revision, and the plaintiffs and federal defendants agree that the notice requirement contained in paragraph 10 of the January 5, 2001, Agreement has been satisfied.

Miscellaneous Provisions

7. With regard to the Service's November 8, 2002, Federal Register notice regarding additional measures for the protection and recovery of manatees, the Service agrees to provide to the plaintiffs and defendant-intervenors no later than February 12, 2003, all comments received by the Service in response to the notice. Any comments postmarked before the close of the public comment period but received after February 7, 2003, will be provided to the plaintiffs and defendant-intervenors in a supplemental submission. No later than March 10, 2003, the Service will meet with the plaintiffs and defendant-intervenors for the purpose of conferring on additional protection measures identified in the public comments that may be warranted, and the form and substance of such measures.
8. The plaintiffs and federal defendants acknowledge the Service's memorandum dated January 22, 2003, concerning "Law Enforcement Priorities and Manatee Protection Measures." The plaintiffs and federal defendants recognize that a failure by the Service to take any actions specified in the memorandum shall not constitute a violation of this Stipulated Order. The plaintiffs and federal defendants also agree that, until the date of the last report due under paragraph 3 of this Stipulated Order, or until December 31,

2003, whichever occurs first, should the federal defendants revise, change or supercede the substance of the memorandum described in this paragraph, through the Director of the Service or the Assistant Secretary for Fish and Wildlife and Parks of the U.S. Department of the Interior, the Service will, within ten (10) working days, notify plaintiffs and defendant-intervenors through counsel of record of any such change.

9. The plaintiffs and federal defendants acknowledge the Assistant Secretary for Fish and Wildlife and Parks' memorandum dated December 23, 2002, concerning "Manatee Conservation" in national parks in Florida. The plaintiffs and federal defendants recognize that a failure by the National Park Service ("NPS") to take any actions specified in the memorandum shall not constitute a violation of this Stipulated Order. The plaintiffs and federal defendants also agree that, until the date of the last report due under paragraph 3 of this Stipulated Order, or until December 31, 2003, whichever occurs first, should the federal defendants revise, change or supercede the substance of the memorandum referred to in this paragraph, through the Director of NPS or the Assistant Secretary for Fish and Wildlife and Parks of the U.S. Department of the Interior, the Service will, within ten (10) working days, notify plaintiffs and defendant-intervenors through counsel of record of any such change.

Fees and Expenses

10. Plaintiffs and federal defendants agree that the plaintiffs are entitled to an award of reasonable attorneys' fees and expenses incurred in enforcing before this court the terms of paragraph 11 of the January 5, 2001 court order. The Plaintiffs and federal defendants will attempt to agree on the appropriate amount of such an award. If they are unable to do

so, they will complete the briefing on Plaintiffs' pending motion for fees and costs. Plaintiffs' and federal defendants' agreement that the Court should vacate the August 1, 2002 and November 7, 2002 Orders to Show Cause does not affect any claim by the Plaintiffs for attorneys' fees, costs, or expenses associated with resolution of the existing dispute between the parties.

Orders to Show Cause Why Federal Defendants Should Not Be Held in Contempt

11. The plaintiffs and federal defendants agree that, in light of the commitments made by the federal defendants in this Stipulated Order, no contempt citation should be issued against the federal defendants and that the Court's orders of August 1, 2002, and November 7, 2002, to show cause why the federal defendants should not be held in contempt should be vacated. The plaintiffs and federal defendants have therefore jointly proposed vacature as part of this Order.
12. The Plaintiffs reserve the right to file any motion to enforce for any alleged future violations of the settlement agreement or this stipulated order.
13. Upon the Court's approval of this Stipulation the federal appellants will file a FRAP 42(b) motion to dismiss the appeal of this Court's August 1, 2002, order in Save the Manatee Club et al v. Ballard et al, D.C. Cir. 02-5318.

Dispute Resolution Procedures and Other Provisions

14. The plaintiffs and federal defendants stipulate to the following dispute resolution process:
 - A. In the event that any dispute or potential dispute arises between the plaintiffs and federal defendants with respect to the terms or conditions of this Stipulated Order, the party asserting such dispute shall invoke the provisions of this paragraph prior

to seeking resolution of the dispute by other means, including seeking relief from the Court.

B. In the event of any dispute or claim ("controversy") arising out of or relating to this Stipulated Order or an alleged breach thereof, the plaintiffs and federal defendants shall use their best efforts to settle the controversy. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to all parties. Any party to this Stipulated Order asserting a controversy shall notify all other parties hereto, in writing, stating the nature of the matter to be resolved and the position of the party asserting the controversy (the "notice of controversy"). The parties receiving the notice of controversy shall respond in writing within ten (10) working days, stating their position regarding the controversy. For purposes of this paragraph, notice shall be deemed provided when the written notice of controversy is actually received by Jean Williams, Chief of the Wildlife and Marine Resources Section, on behalf of the federal defendants, and Eric Glitzenstein on behalf of the Plaintiffs.

C. If the plaintiffs and federal defendants do not resolve the controversy to their mutual satisfaction within ten (10) working days from the date on which the response to the notice of controversy is delivered, the aggrieved party may file a motion for relief to be adjudicated by the Court.

15. Should the Service determine that good cause exists to delay the time frames set forth in this Stipulated Order, the Service shall provide notice to that effect, as soon as

practicable, to the Plaintiffs' and defendant- intervenors' counsel along with a statement describing the reason for the delay. Should the plaintiffs and federal defendants be unable to agree to an appropriate extension of time, the federal defendants will file a motion for appropriate relief pursuant to Fed. R. Civ. P. 60(b) to obtain any extension of the time frames prescribed in this Stipulated Order.

16. No provision of this Stipulated Order shall be interpreted as or constitute a commitment or requirement that federal defendants take actions in contravention of the ESA, Clean Water Act ("CWA"), MMPA, APA or any other law or regulation, either substantive or procedural.
17. Nothing in this Stipulated Order shall be interpreted or construed as a commitment or requirement that the Service or the Corps obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other law or regulation.
18. Except as expressly provided herein, nothing in this Stipulated Order shall be construed to limit or modify the Service's or the Corps' discretion under any applicable law including, but not limited to, the ESA, MMPA, CWA or general principles of administrative law.
19. The parties agree that this Stipulated Order should not be taken as an admission of any wrongdoing or legal error by defendants or as legal precedent in any matters unrelated to the controversy that is the subject of this Stipulation.
20. This Stipulated Order may be modified by the Court pursuant to the written agreement of the plaintiffs and the federal defendants.
21. The terms of this Stipulated Order shall become effective upon entry of an order by the

Court ratifying this Stipulated Order. This Court shall retain jurisdiction to enforce this Stipulated Order.

IT IS SO ORDERED, that the above Stipulation shall be complied with, and;

IT IS FURTHER ORDERED, that the Court's Orders to Show Cause dated August 1, 2002, and November 7, 2002, are hereby vacated.

DATED: 3/18/03

Eric R. Glitzenstein
UNITED STATES DISTRICT JUDGE

Presented by:

Jean Williams
JEAN E. WILLIAMS, Chief
WAYNE D. HETTENBACH, Trial Attorney
Wildlife and Marine Resources Division
U. S. Department of Justice
Ben Franklin Station, P. O. Box 7369
Washington, DC 20044-7369
(202) 305-0210

Dated: 1/23/03

Attorneys for Defendants

Eric R. Glitzenstein
ERIC R. GLITZENSTEIN (DC Bar 358287)
Meyer & Glitzenstein
1601 Connecticut Ave., N.W.
Suite 700
Washington, D.C. 20009
(202) 588-5206

Dated: 1/23/03

Attorney for Plaintiffs

EXHIBIT A
ADDITIONAL MANATEE PROTECTION AREAS

Caloosahatchee River - Lee County

A. From the Edison Bridge northeast to the railroad trestle

Current

Slow speed year-round outside the marked channel, 25 mph year-round in the marked channel.

Proposed

Establish a seasonal slow speed (November 15-March 31) and 25 mph (April 1-November 14) in the marked channel.

B. Between the Caloosahatchee Bridge and the Edison Bridge

Current

The current speed zone between these two bridges is a slow speed year-round ¼ mile zone channel included along the eastern shoreline. The marked channel runs through the slow speed zone at this location.

Proposed

Establish a slow speed year-round zone, channel included, from shoreline-to-shoreline between the bridges with a slow speed year-round 500-foot buffer extending east of the Edison Bridge and west of the Caloosahatchee Bridge.

C. From the Caloosahatchee Bridge southwest to Shell Point (Channel Marker 93)

Current

Slow speed year-round ¼ mile buffer zone along both shorelines with unregulated speed outside the buffer.

Proposed

Extend the existing slow speed buffer from the shoreline to a point roughly 300 feet from the near side of the navigation channel. In any location where the distance from the shoreline to

the point approximately 300 feet from the near side of the navigation channel is less than 1/4 mile, the 1/4 mile slow speed buffer will prevail and extend to the navigation channel.

Establish a slow speed year-round shoreline-to-shoreline zone, channel included, that extends 500 feet north and south of the Cape Coral Bridge.

Establish a slow speed year-round zone shoreline-to-shoreline, channel included, from channel marker 72 to 82 (approximate) at Redfish Point. Each boundary line for this zone is a perpendicular line extending from one shoreline through the channel marker to the opposite shoreline

D. San Carlos Bay (description of area is available below - under "Proposed")

Current

A slow speed zone is in place on the eastern portion of this area (in the vicinity of Shell Creek). The remainder of the area is unregulated south of and including the intracoastal waterway.

Proposed

Establish a slow speed year-round zone in a portion of the southern half of the bay. The northern boundary for this zone is the southern edge of the Intracoastal Waterway (ICW). The southern boundary is Sanibel Causeway. The western boundary is a line that connects the west end of the easternmost island forming the Sanibel Causeway and extends northwest to the western shoreline of Merwin Key intersecting the ICW. The eastern boundary is the existing slow speed year-round zone that covers Punta Rassa Cove.

St. Johns River - Duval, Clay, and St. Johns counties

A. Downtown Jacksonville between Reddie Point and Navigation Marker 81 (just upstream of Hart Bridge)

Current

Variable width (300-900 feet) slow speed shoreline buffers (both shores).

Proposed

Establish a year-round slow speed zone shoreline-to-shoreline with 25 mph in the marked channel.

B. From Navigation Marker 81 (just upstream of Hart Bridge) to Fuller Warren Bridge

Current

Variable width (300-600 feet) slow speed shoreline buffers (both shores).

Proposed

Establish a year-round slow speed zone shoreline-to-shoreline with 25 mph in the marked channel.

C. St. Johns River south of Fuller Warren Bridge

Current

Variable width slow speed shoreline buffer (both shores).

Proposed

Establish slow speed year-round 1,000-foot minimum buffers for the river along both shorelines extending from the Fuller Warren Bridge upstream to Peter's Creek in Clay County on the western shoreline and to the south bank of the mouth of Julington Creek in St. Johns County on the eastern shoreline.

Establish a slow speed year-round 900-foot minimum buffer along the entire shoreline of Doctor's Lake.

Halifax River/Tomoka River - Volusia County

A. Tomoka River (entire reach)

Current

Variable zones ranging from year-round slow speed to year-round 25 mph.

Proposed

Establish a year-round slow speed zone, channel included, except where more strictly regulated by 68C-22.012 Florida Administrative Code.

B. Halifax River - Flagler/Volusia County line south to the Seabreeze Bridge

Current

This stretch of river is characterized by a very narrow portion of river extending south from Flagler County and widening out in the vicinity of Tomoka State Park and Atlantic Intracoastal Waterway (AIW) channel marker 9. The narrow portion of the river, known as Halifax Creek, is currently regulated as 30 mph in channel/slow speed outside of channel. From channel marker 9 south to the Seabreeze Bridge, the Halifax River widens considerably with most of this stretch approximately 3,000 feet in width with a 300 foot slow speed shoreline buffer (both shores) and 30 mph otherwise.

Proposed

For Halifax Creek (from the county line south to channel marker 9), establish a slow speed year-round zone outside the marked channel with 25 mph in the channel.

For the Halifax River and the Tomoka Basin, establish slow speed year-round 1,000-foot minimum buffers along both shorelines with 25 mph outside the buffer zones.

Establish a slow speed year-round zone, shore-to-shore, that extends 500 feet north and 1,000 feet south of the SR 40 Bridge.

C. Halifax River - Seabreeze Bridge to Dunlawton Bridge

Current

Variable zones.

Proposed

Establish year-round slow speed 1,000-foot minimum buffers along the shorelines with 25 mph between the buffer zones except where more strictly regulated by 68C-22.012 Florida Administrative Code.

Establish a slow speed year-round shoreline-to-shoreline zone, channel included, extending 500 feet north and south of the Seabreeze and Dunlawton Bridges.

D. Halifax River - Dunlawton Bridge to Ponce de Leon Inlet

Current

Variable zones with 30 mph in AIW.

Proposed

Establish a slow speed year-round zone outside the AIW, with 25 mph in the channel.

E. Ponce de Leon Inlet and adjacent water bodies

Current

Variable zones with 30 mph in the AIW, other marked channels and the inlet itself.

Proposed

Establish a year-round slow speed shoreline-to-shoreline zone outside the AIW and marked access channels, except for maintenance of the existing seasonal slow-speed zone in headwaters of Spruce Creek.

Establish 25 mph in the AIW and the marked access channels.

Maintain the existing 30 mph area in the immediate vicinity of the inlet.

F. Halifax River - approximately one mile south of Ponce de Leon Inlet

Current

Slow speed except for a narrow band of 30 mph along the eastern shore.

Proposed

Establish a slow speed year-round shoreline-to-shoreline zone, channel included.